BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES N. REYER, Deceased Claimant	)	
VS.	)	
CITY OF NEW CAMBRIA Respondent	)	Docket No. **242,934**
AND	)	
ALLIED MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

Claimant appeals from an Award entered on May 26, 2000, by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on October 4, 2000.

APPEARANCES

Patrik W. Neustrom of Salina, Kansas, appeared on behalf of claimant. Matthew S. Crowley of Topeka, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD & STIPULATIONS

The Board has considered the record and adopts the stipulations listed in the Award by the Administrative Law Judge.

ISSUES

James Reyer suffered a fatal heart attack at work on November 20, 1998. The Administrative Law Judge (ALJ) found Mr. Reyer's heart attack was not a compensable injury and denied benefits. "The Court finds that Claimant has failed to sustain his burden of proof that his heart attack arose out of his employment. Specifically, the Court finds that Claimant has failed to show what physical activity precipitated the heart attack, or that such

physical activity was 'more than the employee's usual work in the course of [his] regular employment.' K.S.A. 44-501(e). Further, the Court finds that the record fails to support Claimant's contention that emotional stress rising to the level of an 'external force' precipitated Claimant's heart attack." Claimant disputes that finding and argues that Mr. Reyer's heart attack arose out of his employment with respondent. Conversely, respondent asserts Mr. Reyer was not performing work beyond his normal exertion level at the time he suffered his fatal heart attack, nor was his heart attack due to any external force or agency.

FINDINGS OF FACT & CONCLUSIONS OF LAW

After reviewing the record and considering the briefs and arguments of the parties, the Appeals Board concludes that the Award should be affirmed and benefits denied. The Board agrees with and adopts as its own the findings and conclusions set forth by the ALJ in his Award.

On November 20, 1998, James N. Reyer was a retired 69-year-old, working part time as a maintenance man for the City of New Cambria, Kansas, where he lived. On that date Mr. Reyer suffered a heart attack sometime between 9 a.m. and 9:48 a.m. while operating a tractor to remove a tree trunk or branch that he had sawed down the day before. Although he would occasionally trim or prune trees, he normally did not engage in cutting down entire trees or tree removal. None of the witnesses that testified in this case know for certain whether or not Mr. Reyer used the chain saw that morning or how much physical exertion was required to wrap the chain around the tree trunk or branch that claimant was pulling with the tractor when he suffered his fatal heart attack. Likewise, it is unclear whether anyone other than the mayor, Mr. Elmer David Richards, telephoned or spoke directly to Mr. Reyer about the job and when he would be done. The Board finds that Mr. Richards did not pressure Mr. Reyer to remove the tree any faster than Mr. Reyer had planned.

Although not done frequently, the parties agree that using a chain saw to trim trees was part of Mr. Reyer's usual work and, therefore, would not constitute unusual exertion if the work was done in its usual manner and at Mr. Reyer's own pace. Claimant contends, however, that it was unusual for Mr. Reyer to use a chain saw to cut down an entire tree. Furthermore, Mr. Reyer felt pressured to get the job done quickly and therefore was not working at his own pace. Respondent counters that claimant has failed to prove by a preponderance of the credible evidence that Mr. Reyer had been using the chain saw the day he suffered his fatal heart attack or that Mr. Reyer had been pressured to get the job done. The Board agrees.

Michael H. Sketch, Sr., M.D., who is board certified in internal medicine and associated with the cardiology department of Creighton University's School of Medicine,

reviewed the records at the request of respondent's counsel. In his opinion Mr. Reyer's cause of death was most likely an acute myocardial infarction and cardiac arrest due to claimant's long-standing cardiovascular disease. Given Mr. Reyer's history and risk factors, Dr. Sketch believes that the chain saw activity had nothing to do with the myocardial infarction. Furthermore, neither the emotional nor his physical stress had anything to do with or caused the heart attack. When asked whether either the physical activity or the emotional stress or a combination of the two caused the myocardial infarction, Dr. Sketch answered, "with a reasonable medical certainty they did not."[1] In Dr. Sketch's opinion, "he [Mr. Reyer] would have had a heart attack anyway because he had a vulnerable lesion there which caused the heart attack."

The Board is mindful that the record contains expert medical opinions to the contrary, including those of Barry L. Murphy, M.D., a board certified cardiologist and one of Mr. Reyer's treating physicians. In his opinion, the physical exertion of using the chain saw and the emotional stress of being harassed and compelled to work at a faster pace were sufficient to precipitate claimant's heart attack. The Board, however, does not find the facts support the degree of exertion or stress assumed to be true and relied upon by Dr. Murphy in forming his opinion. Furthermore, when rendering his opinion that either the physical exertion or the emotional stress alone, as opposed to both acting in concert, could have caused Mr. Reyer's heart attack, Dr. Murphy does not describe his conclusions as more probable than not. Instead, Dr. Murphy is less definite and presents his causation opinions in the context of possibilities rather than probabilities.

K.S.A. 1998 Supp. 44-501(e) provides that the injury and death from coronary or coronary artery disease is not compensable unless it is shown that the exertion at work which caused the condition is unusual:

> Compensation shall not be paid in case of coronary or coronary artery disease . . . unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment.

The admissibility of evidence in workers compensation proceedings is more liberal than under the Code of Civil Procedure.[2] And, hearsay evidence is admissible.[3] Nevertheless, the Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the

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[1]Deposition of Michael H. Sketch, Sr., M.D., dated April 14, 2000, p. 24.

[2]Roberts v. J.C. Penney Co., 263 Kan. 270, 281, 949 P.2d 613 (1997).

[3]Pence v. Centrex Construction Co., 189 Kan. 718, 371 P.2d 100 (1962).

conditions on which that right depends.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[5] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[6]

Claimant has the burden of proving a causal relationship between the heart attack and the employment, whether by showing that the exertion of the work necessary to precipitate the heart attack was more than the exertion of Mr. Reyer's usual work, or by showing the heart attack was due to an external force.[7] "Causal relation is a necessary element in establishing liability under our workmen's compensation act and it cannot be presumed but must be proved by the preponderance of the evidence."[8]

Based upon the record presented, the Board finds the greater weight of the credible evidence fails to support the claimant's contention of unusual exertion because claimant has failed to prove that Mr. Reyer engaged in unusual exertion by his use of the chain saw or that he physically lifted a heavy tree trunk or limbs before his heart attack. The greater weight of the credible evidence likewise fails to prove that claimant's heart attack was caused by an external force, namely stress. Therefore, benefits must be denied.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the May 26, 2000, Award entered by Administrative Law Judge Bruce E. Moore should be and is hereby affirmed.

IT IS SO ORDERED.

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[4]K.S.A. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[5]K.S.A. 44-508(g). *See also In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[6]K.S.A. 44-501(g).

[7]Suhm v. Volks Homes, Inc., 219 Kan. 800, 549 P.2d 944 (1976); Dial v. C.V. Dome Co., 213 Kan. 262, 515 P.2d 1046 (1973); Ford v. Robert S. Wise, Inc., 202 Kan. 752, 451 P.2d 251 (1969).

[8]Smith v. Allied Mutual Casualty Co., 184 Kan. 814, 818, 339 P.2d 19 (1959).

Dated this _____ day of August 2001.

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BOARD MEMBER

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DISSENT

I respectfully disagree with the majority's decision. I believe, when considering the entire circumstances, that it is more probably true than not that claimant's myocardial infarction was caused by the unusual strenuous physical exertion and stress of his work activities. Even Dr. Sketch, the medical expert hired by the insurance carrier to testify in this claim, states that claimant had a "vulnerable lesion" that caused the heart attack. I believe the evidence establishes that it is more probably true than not that claimant's "vulnerable lesion" was adversely affected by the effects of unusual strenuous physical exertion. In my opinion, this claim is compensable.

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BOARD MEMBER

c: Patrik W. Neustrom, Attorney, Salina, Kansas
Matthew S. Crowley, Attorney, Topeka, Kansas
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Workers Compensation Director